Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 06-861

In the

Supreme Court of the United States

HULDA SHURTLEFF, Personal Representative of the Estate of ROBERT SHURTLEFF, Deceased, and Assignee of the Estate of CLAIRE G. JUNE, Deceased,
Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY, a Foreign Corporation, and OHIO CASUALTY INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Iowa

PETITION FOR WRIT OF CERTIORARI

RICHARD M. GOODMAN
GOODMAN, KALAHAR
1394 EAST JEFFERSON AVE.
DETROIT, MI 48207
(313) 567-6165

MARK R. BENDURE
Counsel of Record
BENDURE & THOMAS
645 GRISWOLD, SUITE 4100
DETROIT, MI 48226
(313) 961-1525

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

I. WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES ALLOWS THE IOWA COURTS TO GRANT JUDGMENT TO RESPONDENTS, IN THIS INSURANCE COVERAGE DISPUTE, ON THE GROUND THAT THE VEHICLE IN ISSUE **WAS** HIRED BY THE NATIONAL FARMERS ORGANIZATION ("NFO"), AFTER MICHIGAN LITIGATION BETWEEN THE SAME PARTIES CONCLUDED WITH A FINDING THAT THE VEHICLE **WAS NOT** HIRED BY THE NFO?

PARTIES TO THE PROCEEDINGS

On May 13, 1985, Robert Shurtleff was killed when the vehicle in which he was riding was struck by a milk truck owned by Claire June. The fatal collision occurred in Michigan. At the time, June's milk truck was transporting 40,000 pounds of milk for the National Farmers' Organization ("NFO"). Shurtleff's widow, Petitioner, HULDA SHURTLEFF, was appointed Personal Representative of the Estate of her deceased husband. In earlier legal proceedings, she obtained an assignment of any rights Claire June had under applicable insurance policies. As Personal Representative of the Estate of Robert Shurtleff and Assignee of the Estate of Claire June, Petitioner filed the suit which gives rise to this Petition.

Respondent GREAT AMERICAN INSURANCE COMPANY is an insurer which issued an excess insurance policy to the NFO. Petitioner has asserted that the Great American insurance policy covers June's tort liability to the Shurtleff Estate. Respondent OHIO CASUALTY INSURANCE COMPANY is an insurer which, by re-insurance treaty, has assumed a portion of Great American's liability (if any) under the excess policy. Respondents Great American and Ohio Casualty were Defendants in the underlying suit commenced by Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDER BELOW 1

SUPREME COURT JURISDICTION 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

THE REASONS WHY CERTIORARI SHOULD BE GRANTED 7

CONCLUSION 9

APPENDIX

Appendix A: 9/19/06 Order of Supreme Court of Iowa 1a

Appendix B: 6/28/06 Opinion of Court of Appeals of Iowa 2a

Appendix C: 6/8/04 Iowa District Court Ruling on Defendants Great American Insurance Company's and Ohio Casualty Insurance Company's Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment 10a

Appendix D: 10/01/00 Order of Dismissal of Michigan Circuit Court for the County of Wayne . 39a

Appendix E: 12/21/99 Jury Verdict Form 42a

TABLE OF AUTHORITIES

Page

CASES

Baker v. General Motors Corp.,
522 U.S. 222 (1998) 8

Kremer v. Chemical Construction Corp.,
456 U.S. 461 (1982) 8

Matsushita Electric Industrial Co. v. Epstein,
516 U.S. 367 (1996) 8

Monat v. State Farm Ins. Co., 469 Mich. 679; 677 N.W.2d
843 (2004) 8

Nummer v. Michigan Department of Treasury,
448 Mich. 534, 533 N.W.2d 250 (1995) 8

Shurtleff v. Great American Ins. Co.
(No. 6-290/04-1093; opinion released 6/28/06) 1

STATUTES, COURT RULES AND OTHER AUTHORITIES

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1738 . . . . . *Passim*

Full Faith and Credit Clause, United States Constitution,
Article VI, Section 1 . . . . . *Passim*

Restatement (2d) of Judgment, § 27 (1982) 8

OPINIONS AND ORDER BELOW

The summary judgment decision of the Iowa District Court (App. C at 10a - 38a), dated June 8, 2004, is unpublished. The Opinion of the Iowa Court of Appeals [***Shurtleff v. Great American Ins. Co.* (No. 6-290/04-1093; opinion released 6/28/06)**] (App. B at 2a - 9a) is available on-line as 2006 Iowa App. LEXIS 643, but is otherwise unpublished. The Order of the Iowa Supreme Court denying further review (App. A at 1a) is also unpublished.

Petitioner's Full Faith and Credit argument is based on a jury verdict (App. E at 42a) and Order of Dismissal (App. D at 39a - 41a) issued in earlier litigation in Wayne County, Michigan in October of 2000. Those documents are unpublished.

SUPREME COURT JURISDICTION

In earlier Michigan proceedings, the Courts of that State concluded that the milk truck was **not** hired by the NFO. When the Iowa Court of Appeals reviewed this case, it affirmed the decision on a ground not raised by the parties or addressed by the trial judge - - that the milk truck **was** hire by the NFO. That decision, issued on June 28, 2006, by the Iowa Court of Appeals, gave rise to the Full Faith and Credit question now presented.

On July 18, 2006, Petitioner filed a timely Application for Further Review with the Iowa Supreme Court, presenting the Full Faith and Credit issue. The Application was denied by the Iowa Supreme Court on September 19, 2006. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This Petition, filed within 90 days of the Iowa Supreme Court Order denying further review, is timely under this Court's Rule 13.1.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This Petition for Certiorari involves the Full Faith and Credit Clause of the United States Constitution. That Clause, Article IV, Section 1, states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The case also involves 28 U.S.C. § 1738, the Full Faith and Credit statute enacted by Congress:

"The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

Claire June was a stockholder and member of the NFO who operated a wholly-owned corporation, June's Trucking. He owned a milk truck which was used to collect milk from NFO farmers for delivery and sale to the dairy.

During the late afternoon of May 13, 1985, while hauling about 40,000 pounds of milk for the NFO, the June tanker careened across I-96 in Wayne County, Michigan. It collided head-on with a car occupied by three employees of the United States Department of Defense returning home from work, including Plaintiff's decedent, Robert Shurtleff. All three were killed.

In the resulting Michigan civil litigation, June admitted liability.[1] The first damage trial was flawed by erroneous damage instructions, and the Michigan Court of Appeals reversed. On retrial, the jury assessed damages for the three decedent Estates aggregating about $7,000,000. Judgment was entered for the Shurtleff Estate in the principal amount of $2,450,000.

By writs of garnishment filed in Michigan, the decedents' Estates contended that the liability of June was covered by a group of insurance policies in which the NFO was the principal or named insured. Among these was the excess policy sold by Respondent Great American.[2] The Great American policy defines several categories of persons other than the NFO who are also insured. The definition of "Insured" includes two pertinent classes [§ III (d)]: those using a "hired" auto, and a "stockholder" using an auto not owned by the NFO used in the NFO's business:

> "**III. Definition of Named Insured and Insured:** . . . The unqualified word 'Insured' includes the named insured and also: * * * (d) with respect to automobiles, **any person while using any automobile owned by or hired for use by or on behalf of the named insured,** including any person or organization

---

[1] Petitioner also sought recovery against the NFO. The jury found that the milk truck driver was an "independent contractor" rather than an "agent" of the NFO. Accordingly, the NFO was absolved of vicarious liability for the driver's negligence.

[2] Hartford Insurance Company and Indiana Insurance Company also issued insurance policies that might cover June's liability. Petitioner's claims against Hartford and Indiana have been resolved.

> legally responsible for such use, provided the use is within the scope of permission granted by the named insured and **any officer, director, stockholder or partner, of the named insured while using any automobile not owned by the named insured while such automobile is being used in the business of the named insured**" (emphasis supplied).

In the Michigan insurance coverage litigation, Petitioner asserted that June was an insured within the coverage afforded by the clause, "any person while using any automobile . . . hired for use by or on behalf of the named insured". This coverage dispute was delayed by another erroneous ruling from the Michigan trial judge, who summarily dismissed the "hired auto" contention on the ground that the verdict for the NFO in the wrongful death suit was conclusive. The Michigan Court of Appeals reversed, paving the way for trial of the "hired auto" coverage question. At trial, the jury found for the insurer on this point (App. E at 42a), and a judgment for Great American was entered accordingly [Order of Dismissal (App. D at 39a - 41a)].

Following the verdict, extensive negotiations took place. The outgrowth was a stipulation which dismissed other coverage claims, including those arising under the "stockholder" clause, without prejudice to re-filing within one year [Order of Dismissal (App. D at 40a - 41a), p. 2].

The NFO is organized under Iowa law and is headquartered in Iowa. As allowed by the stipulation, Petitioner filed suit against Great American in Iowa on April 11, 2001. She alleged, in substance, that June was covered under the ". . . stockholder . . . of the named insured while using any automobile . . . in the business of the named insured" clause of § III (d) of the insurance policy.

On June 8, 2004, the Iowa District Court granted summary judgment to Respondents (App. C at 10a - 38a). In essence, the trial court concluded that the "stockholder" clause was inapplicable for two reasons. In the court's view, the clause only covered suits against NFO stockholders in their stockholder capacity, and the milk truck was being "used" by June's Trucking, not Claire June. (32a).

Petitioner appealed to the Iowa Court of Appeals, urging that the district court erred on these two points. The appellate court affirmed on a different ground not raised by the parties. It held that Claire June was excluded from coverage under § III (e)(2), which excludes, "the owner or lessor of a hired or non-owned automobile". By its analysis, the milk truck was "hired" or "not owned" by the NFO [Court of Appeals Opinion (App. B at 2a - 9a)]:

> "The language excludes from coverage as an, 'insured' under paragraph III(d) the 'owner or lessor of a hired or non-owned automobile.' In context, 'hired or non-owned' can only refer to an automobile the NFO hired or does not own. The truck involved in the accident was owned by Claire June or June Trucking, not the NFO. At the time of the accident, it was being used to haul milk from the producers to a dairy. The hauling was done under contact ('hired') with the NFO. Therefore, whether we view the truck as 'not owned' by the NFO or as 'hired' by the organization, it falls within the exception from coverage in paragraph III(e)(2). We agree with the district court that June is not covered by the Great-American policy at issue, but for a different reason than the district court."

Petitioner sought further review from the Iowa Supreme Court. She argued that the Full Faith and Credit Clause required the Iowa courts to accept, and give preclusive effect to, the Michigan adjudication that the milk truck was **not** hired by the NFO. That Court denied further review by Order of September 19, 2006 (App. A at 1a).

In short, the Michigan litigation ended favorably to Great American due to the finding that the milk truck **was not** hired by the NFO. The Iowa action was decided for the insurer on the basis that the truck **was** hired by the NFO. Petitioner now asks the Court to decide whether the Full Faith and Credit Clause permits that result.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

The Full Faith and Credit Clause (Art. IV, § 1) of the Constitution provides that:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

As authorized by the Clause, Congress has enacted supportive legislation. In pertinent part, the Full Faith and Credit statute, **28 U.S.C. § 1738,** accords a Michigan judgment the same preclusive effect in Iowa at it has in Michigan where issued:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith

and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

The decisions of this Court have repeatedly recognized that the essence of the Cla se and statute is to give a state court judgment the same *res judicata* or collateral estoppel effect in a federal court or sister state court as it has under the law of the State where rendered. ***Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 373 (1996); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-482 (1982).** This Court's Full Faith and Credit jurisprudence counsels that, if the Michigan jury's "no hired auto" finding has collateral estoppel effect under Michigan law, the Iowa courts were obligated to accept and apply that finding, and to refrain from later reaching the opposite conclusion.

The generally accepted principle of collateral estoppel was described in ***Baker*, 522 U.S. at 233, n. 5**, citing **Restatement (2d) of Judgments, § 27 (1982).** Under that principle, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or different claim". This is the standard embraced by Michigan law as well. ***Monat v. State Farm Ins. Co.*, 469 Mich. 679; 677 N.W.2d 843 (2004); *Nummer v. Michigan Department of Treasury*, 448 Mich. 534, 542; 533 N.W.2d 250 (1995).**

In the Michigan litigation, it was found that the milk truck was not hired by the NFO (App. E at 42a). Under Michigan principles of collateral estoppel, this finding precludes another court from later finding to the contrary. In turn, the Full Faith and Credit Clause and **28 U.S.C. § 1738** require the

Iowa courts to give the same effect to the Michigan judgment in Iowa. The Iowa appellate court's finding that the milk truck was hired by the NFO can not be squared with the Full Faith and Credit Clause or **28 U.S.C. § 1738.**

With the way the federal issue arose in the Iowa courts - - a *sua sponte* "hired by NFO" finding by the Court of Appeals and denial of review by the Supreme Court - - the record is barren of any explanation why the Michigan "not hired by NFO" finding was disregarded. Nor is there any indication that the Iowa Courts considered the Full Faith and Credit implications of their rulings.

This Court has not recognized judicially created reasons for disregarding the command of the Full Faith and Credit provision of Art. IV, § 1 and **28 U.S.C. § 1738**. The Iowa Courts articulated no rationale for doing so. This Court should grant certiorari to consider whether there is any plausible basis for the Iowa courts to reach a conclusion diametrically opposed to that previously established by Michigan judgment.

With the way the Iowa decision unfolded, no Iowa Court has explained how, or why, the Michigan "not hired by NFO" finding can be disregarded consistent with federal law. In lieu of granting certiorari, this Court could justifiably remand to the Iowa Supreme Court, with directions to consider Petitioner's arguments under **Art. IV, § 1** and **28 U.S.C. § 1738.**

CONCLUSION

In the final analysis, Petitioner has lost her insurance coverage cases on the basis of two inconsistent findings: the Michigan "not hired by NFO" finding and the Iowa "hired by

NFO" ruling. In the process, her invocation of rights arising under the United States Constitution has fallen on deaf ears. The guarantees of federal law and the principles they vindicate are too precious to be ignored. The refusal of the Iowa Courts to respect the Michigan Judgment is unprecedented and presents important questions of inter-state comity. The rulings below fail to accord the Full Faith and Credit Clause its constitutional due. The Court should grant certiorari or remand for consideration of Petitioner's federal arguments.

Respectfully submitted,

GOODMAN KALAHAR
RICHARD M. GOODMAN (P14169)
1394 East Jefferson
Detroit, Michigan 48207
(313) 567-6165

BENDURE & THOMAS
MARK R. BENDURE (P23490)
Counsel of Record
645 Griswold, Suite 4100
Detroit, Michigan 48226
(313) 961-1525

Attorneys for Petitioner

Dated: December 15, 2006

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 04-1093
Polk County No. CV 86059

[Filed September 19, 2006]

HULDA SHURTLEFF, Personal Representative of the Estate of ROBERT SHURTLEFF, Deceased, and Assignee of the Estate of CLAIRE G. JUNE, Deceased,
Plaintiff-Appellant/Cross-Appellee,

vs.

GREAT AMERICAN INSURANCE COMPANY, a Foreign Corporation, and OHIO CASUALTY INSURANCE COMPANY,
Defendants-Appellees/Cross-Appellants.

After consideration by this court, further review of the above captioned case is denied.

Dated this 19th day of September, 2006.

THE SUPREME COURT OF IOWA

By /s/
Louis A. Lavorato, Chief Justice

APPENDIX B

COURT OF APPEALS OF IOWA

No. 6-290 / 04-1093

[Filed June 28, 2006]

HULDA SHURTLEFF, Personal Representative of the Estate of ROBERT SHURTLEFF, Deceased, and Assignee of the Estate of CLAIRE G. JUNE, Deceased,
Plaintiff-Appellant/Cross-Appellee,

vs.

GREAT AMERICAN INSURANCE COMPANY, a Foreign Corporation, and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan Corporation,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Joel D. Novak (motions for summary judgment) and D. J. Stovall (motions to dismiss), Judges.

Plaintiff appeals from the district court's grant of defendants' motion for summary judgment and denial of plaintiff's motion for summary judgment. Defendants cross-appeal from the district court's denial of defendants' motions to dismiss. **AFFIRMED.**

Roxanne Barton Conlin of Roxanne Conlin & Associates, Des Moines, and Richard M. Goodman and Kathleen J. Kalahar of Goodman, Lister & Peters, P.C., Detroit, Michigan, for appellant.

Leonard B. Schwartz of Sommers, Schwartz, Silver & Schwartz, P.C., Southfiled, Michigan, for appellee/cross-appellant Great American Insurance Company.

Kent A. Gummert and Frank A. Comito of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellees/cross-appellants Great American Insurance Company and Ohio Casualty Insurance Company.

John R. Monnich of John R. Monnich, P.C., Royal Oak, Minnesota, for appellee/cross-appellant Ohio Casualty Insurance Company.

Brian A. Stowe of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee Michigan Mutual Insurance Company.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

OPINION

SACKETT, C.J.

Plaintiff appeals from the district court's order in June of 2004, granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment. The appeal was transferred to our court in April of 2006. Defendants cross-appeal from the district court's denial of their motions to dismiss and from part of the ruling granting their motion for summary judgment. We affirm.

I. BACKGROUND AND PROCEEDINGS.

Plaintiff's decedent, a Michigan resident, was killed in Michigan in a 1985 motor vehicle accident with a truck owned by Claire June, a Michigan resident. A wrongful death suit in Michigan against Claire June, his company June's Trucking, the truck driver Richard June, and the National Farmers Organization[1] ("NFO") resulted in judgment against Claire June and a jury verdict in favor of the NFO on the claims of negligence and that it was the employer of June or his company. Based on the judgment against Claire June, plaintiff issued a writ of garnishment, which was served on various insurance carriers. Plaintiff claimed Claire June was covered under insurance policies issued to the NFO by defendants.[2] At the garnishment trial in 1999, the jury found for defendant Great American Insurance Company ("Great American") on the claims of coverage of Claire June as user of a vehicle "hired" by or "owned" by the NFO. By stipulation of the parties, in October of 2000 the court dismissed without prejudice the claims that Claire June was covered as a stockholder and that the organization was estopped from denying coverage. In September of 2000 the parties executed a "tolling agreement" that tolled the statute of limitations for one year from the court's order, "but only

---

[1] Claire June is a member of the National Farmers Organization. His trucking company hauls bulk milk for the organization. It was his milk truck that was involved in the accident.

[2] Great American Insurance Company and Ohio Casualty Insurance Company are Ohio corporations that conduct business in Iowa and Michigan. Great American issued a catastrophe liability policy to the National Farmers Organization.

to the extent that the statute of limitations has not already expired."

In April of 2001 plaintiff filed suit in Iowa against defendants, claiming that Claire June was covered by Great American's policy issued to the NFO (1) as a stockholder, and (2) as owner of the truck being used "in the business of" the organization at the time of the accident. Great American unsuccessfully moved to dismiss based on *forum non conveniens* grounds. After discovery, Great American moved for summary judgment in July of 2003. Plaintiff filed a cross-motion for summary judgment in February of 2004. In June of 2004, the district court granted defendants' motion for summary judgment and denied plaintiff's cross motion. This appeal and cross-appeal ensued.

II. SCOPE AND STANDARDS OF REVIEW.

Review of summary judgment rulings is for correction of errors at law. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005); *see* Iowa R. App. P. 6.4. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981. It "is properly granted if the only controversy concerns the legal consequences flowing from undisputed facts." *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999). We must determine whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law. *Galbraith v. Allied Mut. Ins. Co.*, 698 N.W.2d 325, 327 (Iowa 2005). When the facts are not in dispute, "[o]ur role is simply to decide whether we agree with the district court's application of the law to the undisputed facts before us." *Kennedy v. Zimmermann*, 601 N.W.2d 61, 64 (Iowa 1999) (quoting *Goodell v. Humboldt County*, 575 N.W.2d 486, 491 (Iowa 1998)). Fact findings by

the district court are binding on appeal if supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*).

III. Discussion.

Appeal. The "only issue" in plaintiff's appeal is whether Claire June is an "insured" under the Great American catastrophe liability policy issued to the NFO, so that the policy provides coverage for liability imposed on him as a result of the motor vehicle accident in which plaintiff's decedent was killed. In its ruling on the motions for summary judgment, the district court analyzed the policy language at length, concluding Claire June was not an insured for purposes of coverage for the accident. The pertinent policy provisions of section III "Definition of Named Insured and Insured" are as follows:

> The unqualified word "Insured" includes the named insured and also:
>
> (a) any officer, director, employee or stockholder of the named insured while acting within the scope of the person's duties as such;
>
> . . . .
>
> (d) with respect to automobiles, any person while using any automobile owned by or hired for use by or on behalf of the named insured, including any person or organization legally responsible for such use, provided the use is within the scope of permission granted by the named insured and any officer, director, stockholder or partner of the named insured while using an automobile not owned by the named

insured while such automobile is being used in the business of the named insured;

(e) except as respects the named insured, none of the following shall be an insured under paragraph (d)

. . . .

(2) the owner or lessor of a hired or non-owned automobile, or any agent or employee of such owner or lessor. This subdivision (2) shall not apply if it restricts the insurance under sub-division (i) below.

. . . .

(i) any additional insured(s) included in the underlying insurance listed in Schedule A, but only to the extent that such insurance is provided for such additional insured(s) thereunder.

The NFO is the "named insured" under the policy. The policy definition of "automobile" includes "semi-trailer," such as the type of vehicle owned by Claire June. The "underlying insurance" listed in schedule A is a policy issued by Hartford Insurance Company ("Hartford") to the NFO. Hartford was one of the insurance companies served with the writ of garnishment. It settled with plaintiff for the limits of its coverage before trial on the garnishment.

Paragraph III(d) expands coverage beyond the named insured to include as "insured" certain classes of persons "with respect to automobiles." Paragraph III(e) restricts the scope and application of III(d). The applicability of subdivision III(e)(2) is qualified by paragraph III(i).

The district court found Claire June was not an insured in the underlying Hartford policy because he was not included explicitly as an "automatic insured" nor added via an endorsement as an "additional insured," either specifically or as part of a class. The court concluded, therefore, the reference to paragraph III(i) in subdivision III(e)(2) does not preclude the potential application of subdivision III(e)(2) to restrict paragraph III(d).

In analyzing subsection III(e)(2) the district court determined that "the owner of a non-owned automobile" "is enigmatic in effect because it expresses no clear and specific meaning" and it "lends itself to a certain degree of confusion." The policy excludes from coverage as an insured "the owner or lessor of a hired or non-owned automobile." We believe the problem with the district court's conclusion stems from the misquoting of the language to read "owner of a non-owned automobile." While we agree with the district court that "owner of a non-owned automobile" is not clear, the policy language "owner or lessor of a hired or non-owned automobile" is not ambiguous or unclear as used in the policy.

The language excludes from coverage as an "insured" under paragraph III(d) the "owner or lessor of a hired or non-owned automobile." In context, "hired or non-owned" can only refer to an automobile the NFO hired or does not own. The truck involved in the accident was owned by Claire June or June Trucking, not the NFO. At the time of the accident, it was being used to haul milk from the producers to a dairy. The hauling was done under contract ("hired") with the NFO. Therefore, whether we view the truck as "not owned" by the NFO or as "hired" by the organization, it falls within the exception from coverage in paragraph III(e)(2). We agree with the district court that June is not covered by the Great

American policy at issue, but for a different reason than the district court.

Having concluded June is excluded from being an insured by the language of subsection III(e)(2), we do not address the parties' arguments concerning coverage under paragraph III(d) as a "stockholder" or as a person "using" an automobile. We also affirm the district court's determination paragraph III(i) does not preclude the application of subsection III(e)(2) because June is not an insured in the underlying insurance policy issued by Hartford.

Cross-appeal. Defendants' contention the district court erred in finding June did not come within the exception language of subsection III(e)(2) is addressed in the previous section of this opinion. Defendants raise two issues on cross appeal, relating to the district court's denial of a motion to dismiss this action as barred by the statute of limitations and its denial of a motion to dismiss based on *forum non conveniens* grounds. Having affirmed the district court's grant of summary judgment in favor of defendants, we need not address their claims raised on cross-appeal.

AFFIRMED.

APPENDIX C

IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

Law No. CL 86059

[Filed June 8, 2004]

HULDA SHURTLEFF, Personal Representative of the Estate of ROBERT SHURTLEFF, deceased, and Assignee of the Estate of CLAIRE G. JUNE, deceased, Plaintiff,	)
v.	)
GREAT AMERICAN INSURANCE COMPANY, a foreign corporation, OHIO CASUALTY INSURANCE COMPANY, a foreign corporation, and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, Defendants.	)

RULING ON DEFENDANTS GREAT AMERICAN INSURANCE COMPANY'S and OHIO CASUALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT, and PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The above-captioned matter came before the Court for hearing on April 16, 2004. Attorneys Leonard B. Schwartz, Frank A. Comito, and Kent A. Gummert represent the defendant, Great American Insurance Company. Attorney John R. Monnich represents the defendant, Ohio Casualty Insurance Company. Plaintiffs are represented by attorneys Roxanne B. Conlin, Richard M. Goodman, and Kathleen Kalahar. Upon examining the file and considering the parties' respective written and oral arguments, the Court now issues the following ruling:

STATEMENT OF THE CASE

1. Statement of Facts

On May 13, 1985, Robert Shurtleff died in an automobile accident in Michigan. At the time of the accident, Robert Shurtleff and his spouse, Plaintiff Hulda Shurtleff, were domiciled in Michigan. Plaintiff continues to reside in Michigan. Plaintiff was appointed by the Probate Court for Livingston County, Michigan, as the personal representative of her deceased husband's estate.

The accident which killed Robert Shurtleff involved the collision of an automobile owned by Mr. Shurtleff and a tractor-trailer driven by Richard June and owned by Claire June, both of whom were Michigan residents. Richard June was operating the tractor-trailer in his capacity as an employee of June's Trucking, Inc., which was a Michigan corporation. Claire June was the CEO and whole owner of June's Trucking, Inc.

The tractor-trailer operated by Richard June and owned by Claire June was used to haul bulk milk for the National Farmers Organization ("NFO"), a national agricultural cooperative headquartered in Iowa. Claire June had been registered in the NFO's national membership records as a stockholder since 1981 and remained a stockholder as of the date of the subject accident. *(See* Pl. Ex. 2 at pp. 5, 13.)

At the time of the accident, Claire June's tractor-trailer was being used to perform a written milk supply contract formed between the NFO and the Guernsey Dairy. The supply contract called for the delivery of 40,000 lbs. of NFO milk to Guernsey in fulfillment of that contract. *(See* Pl. Ex. 2 at pp. 55, 120.) Walt Albers, an NFO National Officer and former Membership Director, testified that it was the "business obligation" of the NFO "to get the milk [to the Guernsey Dairy]". (*Id.* at pp. 120-21.) Under the terms and provisions of that supply contract, the NFO was obligated to supply Guernsey with its daily requirements of raw milk by delivering the milk to their plant near Detroit. (*Id.* at p. 120.) Claire June's truck displayed the NFO trademark. *(See* Pl. Ex. 6 at pp. 9-12.) The truck did not exhibit the name of Claire June, June's Trucking, or June's Trucking, Inc. *(See* Pl. Ex. 9.)

On May 13, 1985, Claire June instructed Richard June to drive the tractor-trailer to the Guernsey Dairy. On the way to the Guernsey Dairy, the left front tire of the truck blew out and the truck crossed the center-line into the path of the car occupied by Mr. Shurtleff, and two other passengers, Mr. Koster and Ms. Munsell. All three passengers were killed. Claire June's truck was later found to have bald tires and defective brakes. *(See* Pl. Ex. 8; Ex. 9 at p. 2.) Claire June d/b/a June's Trucking and Richard June were criminally

convicted of negligently "operating" an automobile causing the death of Plaintiff's decedent. (See Pl. Ex. 1; Ex. 10.)

2. **Statement of Procedure**

As a consequence of the accident which killed her husband, Plaintiff Hulda Shurtleff, as the personal representative of her late husband's estate, brought a wrongful death case against the following defendants: Claire June, Richard June, June's Trucking, Inc., and the NFO. Said action was brought in the Wayne County Circuit Court in Michigan in 1985. The NFO was included in the wrongful death suit because it was surmised that the Junes were operating their truck in the furtherance of NFO business at the time the accident occurred.

In 1989, the NFO was awarded a jury verdict in its favor, both as to its negligence and to the contention that it was not the "employer" of Claire June or his companies. *(See* Pl. Ex. 11.) The Michigan Court of Appeals later affirmed this judgment. Judgment was, however, entered against the Junes. The judgment against Claire June was subsequently reversed by the Michigan Court of Appeals in 1990 on the issue of damages only. *(See* Pl. Ex. 11.) A retrial pertaining to the damages issue ensued in 1992, and judgments against Claire June were entered on January 15, 1993. The amounts of those judgments were as follows: $3,121,167.77 in favor of the Munsell estate; $5,411,736.29 in favor of the Koster estate; and $4,708,058.07 in favor of the Shurtleff estate, plus interest as allowed by M.C.L.A. § 600.6013. *(See* Pl. Ex. 12.)

The defendants, Great American Insurance Company ("Great American") and Ohio Casualty Insurance Company ("Ohio Casualty") are Ohio corporations which conduct

business in Iowa and Michigan. Both Great American and Ohio Casualty are wholly owned subsidiaries of the American Financial Corporation, an Ohio based insurance holding company. Great American issued an excess umbrella policy to the NFO.

In August of 1992, prior to the December of 1992 retrial, the plaintiffs provided to Great American written notice of their contention that Great American's policy issued to the NFO covered Claire June individually. *(See* Pl. Ex. 3.) Also, the plaintiffs offered to set aside the still existing finding of liability to allow Great American to participate in the case without having to assume the burden of adverse prior judgment against the Junes. *(See* Pl. Ex. 13.) Following the plaintiffs' letter dated August 6, 1992, the law firm representing Claire June on behalf of Defendant Michigan Mutual wrote Great American and identified the Michigan Mutual attorney representing Claire June at the upcoming trial. *(See* Pl. Ex. 15.) Great American responded to these communications after the January 15, 1993 final judgment against Claire June on retrial.

As a result of the judgment against Claire June in Wayne County, Michigan, the plaintiffs issued a writ of garnishment in 1993. Said writ of garnishment was served on various insurance carriers, including Great American. The plaintiffs claimed coverage under the Great American Policy (policy no. 6-27-84-59-01) as a user of a vehicle "hired" by the NFO and/or a vehicle "owned" by the NFO. In addition, the plaintiffs claimed coverage based on the premise that Claire June was a stockholder/member of the NFO. Finally, the plaintiffs claimed Great American was "estopped" from denying coverage. Of course, Great American denied it was obligated to Claire June individually or June's Trucking, Inc., and therefore not subject to garnishment.

The three plaintiffs' garnishments were tried together in November and December of 1999. The Hartford Insurance Company, the underlying insurer, settled by paying its limits of liability prior to trial. *(See* Pl. Ex. 16.) The court orally granted Great American's motion for summary judgment as it concerned the "stockholder" claim. This issue was thus not submitted to the jury. The "estoppel" issue was severed and likewise not tried. The two issues which were presented to the jury, whether Claire June was using a vehicle "hired" and/or "owned" by the NFO, were decided in favor of Great American.

Subsequent to the garnishment trial, extensive negotiations occurred between Great American's counsel and counsel for Plaintiff Shurtleff. Because the form of judgment could not be agreed upon, the parties stipulated a dismissal of all claims with prejudice except for the "estoppel" and "member/stockholder" issues. These issues were dismissed without prejudice. *(See* Pl. Ex. 17.) The parties also executed a separate, contemporaneous written agreement that provided that the Plaintiff had one year from the date of entry of the Order of Dismissal within which to re-file the action. *(See* Pl. Ex. 18.) On April 11, 2001, Plaintiff filed the instant action.

Any additional facts are recited below as they relate to the issues presented.

STANDARD OF REVIEW

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Schoff v. Combined Ins. Co.*, 604 N.W.2d 43, 45 (Iowa 1999); *see generally* IOWA R. CIV. P. 1.981. An issue is "material" only when the dispute is over facts that might affect the outcome of the suit, given the

applicable governing law. *Baratta v. Polk Cty. Health Servs.*, 588 N.W.2d 107, 109 (Iowa 1999) (citing *Fees v. Mutual Fire & Auto Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992)).

The moving party has the burden to show the non-existence of a material fact and the record must be viewed in the light most favorable to the non-moving party. *Schoff*, 604 N.W.2d at 45. That determination is made by examining the pleadings, depositions, answers to interrogatories, admissions, and affidavits incorporated in the motion and any resistance. IOWA R. CIV, P. 1.981(c); *Clinton Nat'l Bank v. Saucier*, 580 N.W.2d 717, 719 (Iowa 1998). A fact issue is generated if reasonable minds can differ on how the issue can be resolved. *Schlueter v. Grinell Mut. Reinsurance*, 553 N.W.2d 614, 616 (Iowa App. 1996). When the facts are undisputed and the only issue is what consequences flow from the facts, summary judgment is appropriate. *Kennedy v. Zimmerman*, 601 N.W.2d 61, 63 (Iowa 1999).

ANALYSIS

I. **Whether potential coverage provided to Claire June under section III(d) of the Great American insurance policy is expunged by section III(e)(2) of said policy.**

The principal issue of contention in the present case is whether Claire June was insured under Great American's policy issued to the named insured, the NFO. Plaintiff submits that Claire June was clearly an insured under said policy pursuant specifically to section III(d). Obviously, Defendants refute Plaintiff's position.

Section III(d) provides coverage as follows:

> (d) With respect to automobiles, any person while using any automobile owned by or hired by or on behalf of the named insured including any person or organization legally responsible for such use, provided the use is within the scope of permission granted by the named insured ***and any officer, director, stockholder or partner of the named insured while using an automobile not owned by the named insured while such automobile is being used in the business of the named insured.***

Section III(d) may be divided into four sub-parts: (1) whether Claire June is entitled to coverage based on being "any stockholder" of the NFO; (2) whether Claire June's truck was "not owned by" the NFO; (3) whether the accident occurred "while" Claire June was "using" the truck; and (4) whether the truck was "being used in the business of" the NFO when the accident transpired.

The scope and application of section III(d), however, is restricted by section III(e)(2). Indeed, section III(e)(2) provides:

> (e) except as respects the named insured, ***none of the following shall be an insured under paragraph (d)***
>
> (2) the ***owner*** or lessor of a hired or ***non-owned automobile*** or any agent or employee of such owner or lessor. ***This subdivision (2) shall not apply if it restricts the insurance under subdivision (i) below***

(emphasis added). This language illustrates that any coverage granted under subsection (d) is eliminated in the event

subsection (e) applies. However, subsection (e)(2) additionally indicates that this exclusion from coverage under subsection (d) is offset if it infringes upon section III(i) of the policy. The Court will recite section III(i) below.

When construing whether Claire June was insured under the Great American policy issued to the NFO, the Court must abide by general rules of contract interpretation/construction. *See Farmers Ins. Exchange v. Kurzmann*, 668 N.W.2d 199, 203 (Mich. App. 2003). As previously ruled by this Court, Michigan law applies.

In Michigan, as is ubiquitously held elsewhere, the interpretation of a contract is a question of law. The Court must first look to the policy's plain language in deciphering the intent of the contracting parties. Indeed, "[a]n insurance policy is enforced in accordance with its terms." *Twichel v. MIC General Ins. Corp.*, 676 N.W.2d 616, 621 (Mich. 2003); *see also Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003) ("The parties are free to contact as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstances..."); *Farm Bureau Mut. Ins. Co. of Michigan v. Nikkel*, 596 N.W.2d 915 (Mich. 1999) (When a clause in an insurance policy is clear and does not contravene public policy, then it must be enforced as written). Terms undefined by the insurance policy are afforded their commonly ascertained meanings. *Allstate Ins. Co. v. McCarn*, 645 N.W.2d 20, 22 (Mich. 2002). An insurance policy shall be read as a whole, and construed so as to provide a harmonious effect to every word or phrase as far as practicable. *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 453 (Mich. 2003) (citations omitted); *Singer v. Goff*, 54 N.W.2d 290, 292 (Mich. 1952). Therefore, "[a] word is not ambiguous merely because different dictionary definitions exist." *Twichel*, 676 N.W.2d at 621. As a general

rule, an insurance policy is clear and unambiguous when its language leads to only one reasonable interpretation. *Wilkie*, 664 N.W.2d at 787 (citing *Singer v. American States Ins.*, 631 N.W.2d 34 (Mich. 2001)).

It logically follows then that an insurance contract is considered ambiguous in the event its language is subject to more than one reasonable interpretation. *Farmers Ins. Exchange*, 668 N.W.2d at 203 (citation omitted). The interpretation of an ambiguous contract generally presents a question of fact for the jury to decide, ordinarily via the contemplation of extrinsic evidence. *Klapp*, 663 N.W.2d at 453-54. "The law is clear that where the language of the contract is ambiguous, the court/[jury] can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation." *Id.* at 454. (quoting *Penzien v. Dielectric Products Engineering Co., Inc.*, 132 N.W.2d 130 (Mich. 1965)).

Also at play in Michigan is the rule of contra proferentem, which stands for the proposition that any ambiguities in insurance contracts should be construed against the insurer. However, it is important to note that in *Klapp* the Michigan Supreme Court recently clarified generally that the rule of contra proferentem constitutes a rule of "last resort" and "is only to be applied if all conventional means of contract interpretation, *including consideration of relevant extrinsic evidence,* have left the jury unable to determine what the parties intended for their contract to mean" (emphasis added). *Id.* at 455. *Klapp* certainly does not undo the long-standing principle that ambiguous policy language is to be construed against the insurer; rather, it simply establishes that extrinsic evidence, if extant, must be considered beforehand.

Because section III(e)(2) may exclude any potential coverage provided by section III(d), the Court will commence its analysis with section III(e)(2) and section III(i). If section III(e)(2) is determined to apply, then Claire June was not insured by the Great American policy and the Court's journey ends there. Recall, however, that operation of section III(e)(2) is qualified by section III(i). In the event Claire June was covered under section III(i) of the Great American Policy, the exclusion set forth in section III(e)(2) becomes void. Therefore, the Court will first examine whether Claire June was insured pursuant to section III(i).

A. **Section III(i)**

Section III(i) of the Great American policy issued to the NFO expresses an "insured" shall include:

> Any additional insured(s) included in the underlying insurance listed in Schedule A, but only to the extent that such insurance is provided for such additional insured(s) thereunder.

The underlying insurance policy listed in Schedule A is the Hartford policy. (See Pl. Ex. 1; Def. Ex. C.)

Defendants posit that Claire June was not an "insured" under the Hartford policy given that he was not included as an "automatic insured" as explicitly defined in the policy; nor was he added to the policy as an "additional insured" via an endorsement, i.e. amendment to the policy. Plaintiff, on the other hand, asserts that Claire June was clearly afforded coverage by the underlying Hartford policy because Hartford settled with Plaintiff during the prior garnishment action. *(See* Pl. Ex. 16.) Via this settlement, Hartford paid its policy limits.

The Court finds that Claire June was not an "insured" under the Hartford policy. Therefore, the possible applicability of section III(e)(2) is not thwarted by section III(i). Before commencing analysis, it is crucial to sort out the meanings of the varying terms: "named insured", "insured", and "additional insured". A "named insured" refers solely to those persons who are *named specifically* in the policy; it is a restricted meaning. *See* 7 COUCH ON INSURANCE § 110:1 (3rd ed. 2003). The term "named insured" is not synonymous with "insured". *Id.* For instance, the term "insured" is not limited to the "named insured", but applies to *anyone* who is insured under the policy. *Id.* Therefore, an "insured" encompasses the "named insured", as well as any "additional insureds" that may also be covered. *Id.* The term "additional insured" in an insurance policy means any person who is an "insured" under the policy in addition to the "named insured", even if not named or specified in the policy.[1] 8 COUCH ON INSURANCE § 115:3 (3rd ed. 2003).

---

[1] For example, a policy may provide coverage to an "additional insured" in the following manners: "anyone for whom the insured is working", or "any person or organization to whom the named insured is obligated by virtue of a written contract to provide insurance such as is afforded by the policy", or "any organization...to whom or to which [mine operator] is obligated by virtue of written contract to provide insurance such as is afforded by this policy, but only with respect to operations by or on behalf of [mine operator], or to facilities of or used by [mine operator]." *See* 9 COUCH ON INSURANCE § 126.7 (3rd ed. 2003). *See also St. Paul Fire & Marine Ins. Co. v. Quintana*, 419 N.W.2d 60, 62 (Mich.App., 1988), wherein the following endorsements were used: (1) "It is understood and agreed that the Professional Liability Insurance Coverage Form is applicable *only* to professional employees of the named insured while acting in their capacity as employees of the Epilepsy Center of Michigan. It is further agreed

In other words, those "[p]ersons falling within one of the groups or classes specifically referred to in the policy are additional insureds as distinguished from the named insured whose name is specifically mentioned as an insured." *Id.*

Claire June was not a "named insured" in the Hartford policy. Moreover, Claire June was not covered as an "additional insured" because the Hartford policy fails to include him as an "additional insured". "Coverage for such additional insureds must be accomplished by specific endorsement to the policy." 9 COUCH ON INSURANCE § 126.7 (3rd ed. 2003). As explicated above, this does not mean that an "additional insured" must be specifically "named" in the policy, but merely that the generic category or class of "additional insured" must be concisely delineated. *See* 8 COUCH ON INSURANCE § 115:3 (3rd ed. 2003) ("When drafting the terms of an additional insured endorsement, the parties should be certain that the identifying language is in plain English and precisely drafted to include the particular class or group.").

Section D WHO IS INSURED of the Hartford Policy extends coverage to the named insured and any "additional insureds" as set forth herein:

1. YOU are an INSURED for any covered AUTO.

---

that coverage is not provided for any medical doctors"; (2) "It is understood and agreed that the Board of Directors and employees other than medical doctors are included as additional insured but only as respects their liability *in connection with professional services rendered or which [should] have been rendered.*" (Emphasis added.)

> 2. Anyone else is an INSURED while using with YOUR permission a covered AUTO YOU own, hire or borrow except:
>
> 3. Anyone liable for the conduct of an INSURED described above is an INSURED but only to the extent of that liability. However, the owner or anyone else from YOU hire or borrow a covered AUTO is an INSURED only if that AUTO is a TRAILER connected to a covered AUTO YOU own.

The Hartford policy defines "you" as the person or organization shown as the "named insured in number 1 of the declarations". The "named insured", of course, was the NFO. Accordingly, it was the NFO alone that was insured under paragraph "1" of the Hartford policy as the "named insured". Nor is Claire June granted coverage under paragraphs "2" or "3". As it concerns paragraph "2", the Junes were not using an automobile owned, hired or borrowed by the NFO. Rather, Claire June owned the automobile involved in the accident and the truck was being used in furtherance of the business of Junes' Trucking, Inc. Furthermore, Claire June certainly did not require permission from the NFO in order to put his truck into service. Finally, Claire June was not insured under paragraph "3" because even assuming for the sake of argument that the NFO hired or borrowed Claire June's truck, he was not entitled to coverage since the NFO did not own the truck, or the trailer attached thereto. Also, Claire June was not otherwise included as an "additional insured" via any other endorsement.

Plaintiff's assertions in refute are unconvincing. First, Plaintiff cites a plethora of precedence standing for the proposition that an "additional insured" need not be specifically named in the policy in order to be insured. This

is quite true. However, there obviously must be a clause or endorsement explicitly defining the class or group insured as "additional insureds". There is no such endorsement in the Hartford policy including Claire June. Secondly, Plaintiff cites *Federal Kemper Ins. Co. v. American Bankers Ins. Co.*, 357 N.W.2d 834, 839 (Mich. App. 1984) as support for the premise that an insurer's settlement alone establishes that the claimant was insured under the insurer's policy. This argument is unpersuasive, as Plaintiff failed to mention in its brief that there were several other, far more important factors, at play in *Federal Kemper*. The crucial issue in Federal Kemper was whether the potential insured was driving his own automobile while using said automobile in the business of the named insured. *Id.* The most influential evidence presented showing that the potential insured was indeed using his vehicle in the course of the named insured's business was an affidavit affirming such. *Id.* There is absent any evidence of the like here and, in fact, the settlement expresses that Hartford has "consistently denied that the policy of insurance issued to the National Farmers Organization ...provides coverage or indemnification to Claire G. June." *(See* Pl. Ex. 16.) In *Federal Kemper*, The Michigan Court of Appeals did by no means hold that evidence of a prior settlement *alone* proved that the person was insured by the policy.

Accordingly, because Claire June was not an "insured" under the Hartford policy, section III(i) does not preclude the potential applicability of section III(e)(2). Therefore, the Court will now discuss section III(e)(2).

B. **Section III(e)(2)**

Section III(e)(2) denies any coverage given under section III(d) if Claire June was the "owner" of a "non-owned"

automobile. Section III(e)(2) is essentially an "exclusionary clause". Exclusionary clauses in insurance policies must be given effect if clear and specific, but are to be strictly construed in favor of the insured. *Zurich-American Ins. Co. v. Amerisure Ins. Co.*, 547 N.W.2d 52, 55 (Mich. App. 1996); *McKusick v. Travelers Indem. Co.*, 632 N.W.2d 525, 528 (Mich. App. 2001). The burden is upon the insurance company to clearly express the limitations of coverage. *U.S. Fidelity & Guar. Co. v. Group Health Plan of Southeast Michigan*, 345 N.W.2d 683, 686 (Mich. App. 1983).

Plaintiff asseverates that even if Claire June was not an "additional insured" under the Hartford policy and thus not insured under section III(i) of Defendant Great American's policy, section III(e)(2) still does not exclude Claire June from coverage. The following four premises underpin Plaintiff's stance: (1) the language "owner of a non-owned automobile" is so ambiguous as to make section III(e)(2) invalid; (2) Defendants' interpretation of section III(e)(2) fails because it: (a) does not give effect to important policy terms, (b) renders illusory the coverage provided by section III(d), and (c) shows that Great American did not intend for "non-owned auto" to mean an "auto not owned by the named insured"; (3) even if section III(e)(2) were not hopelessly ambiguous, and even if there were a reasonable interpretation of section III(e)(2) that excluded Claire June, other reasonable interpretations of the provision exist that do not exclude him; and (4) when harmonized with plain language of the policy, the ambiguous terminology "the owner of a non-owned automobile" must be interpreted to mean "an automobile not owned by Claire June."

In contravention, Defendants contend the term "non-owned auto" unambiguously refers to an automobile not owned by the named insured, the NFO. Under this

interpretation, Claire June would be excluded from coverage under section III(e)(2) because he, and not the NFO, owned the truck involved in the accident. Defendants avow that this interpretation comports with the commonly understood meaning of "non-owned automobile" and harmonizes with section III(d).

The Court finds that section III(e)(2) does not restrict Claire June from alleged coverage due him under section III(d). In concluding such, the Court need not address each of Plaintiff's arguments. The Court is in agreement with Plaintiff's position that the language encompassed within section III(e)(2) is enigmatic in effect because it expresses no clear and specific meaning, and must therefore be construed in favor of Plaintiff.

First and foremost, the verbiage "owner of a non-owned automobile" lends itself to a certain degree of confusion. In order for the reader of section III(e)(2) to establish who is excluded from coverage, the reader must decipher which party the automobile is not owned by. The Great American policy, however, fails to define the parameters of "non-owned automobile", leaving the reader of the policy to ponder as will be discussed infra. Although undefined terminology does not necessarily mean an insurance policy is ambiguous in effect, the insurer is responsible for clearly expressing the limitations on coverage, and therefore "bears the burden of any confusion which arises as a result of its failure to state clearly the limitations of coverage purchased." *Norgan v. American Way Life Ins. Co.*, 469 N.W.2d 23, 26 (Mich. App. 1991); *see also Automobile Club Ins. Assoc. v. Page*, 413 N.W.2d 472, 474 (Mich. 1987) ("Owned vehicle exclusion clauses are valid so long as they are clear and unambiguous, employing easily understood terms and plain language.").

The exclusionary language "owner of a non-owned automobile" found in section III(e)(2) is primarily ambiguous because it fails to mesh with the plain language set forth in the rest of the provision. For instance, section III(e)(2) begins by stating that "*except as respects the named insured*" (NFO), before ultimately stipulating that an "owner of a non-owned automobile" is not covered by section III(d) of the policy. This preliminary "except for the named insured" language becomes irreconcilable and superfluous when Defendants' propounded interpretation that "non-owned automobile" means "an automobile not owned by the NFO" is applied. Indeed, it is gratuitous for the clause to ostensibly convey that the NFO is insured *even if* it is the "owner of a non-owned auto", when under Defendants' interpretation, it is impossible for the NFO to be the owner of an automobile the NFO does not own. Furthermore, the existence of the "except as respects the named insured" language appears even more strange when one contemplates that section III(e)(2) could not possibly "exclude" the NFO from coverage under section III(d) in any event given that the NFO is the "named insured" under the policy, meaning that the NFO's insured status is not contingent on section III(d) applicability, which merely grants coverage to other "insureds" above and beyond the "named insured". *(See* Pl. Ex. 1.) In other words, the "except as respects the named insured" language is seemingly unnecessary. No matter, it is well known that contracts must be "construed so as to give effect to every word or phrase as far as practicable", and "courts *cannot simply ignore portions of a contract in order to avoid a finding of ambiguity* or in order to declare an ambiguity" (emphasis added). *Klapp*, 663 N.W.2d at 453.

Moreover, section III(e)(2) is also ambiguous for the more subtle reason that it is prone to more than one interpretation. Plaintiff espouses that in addition to any interpretation offered

by Defendants, "owner of non-owned auto" may be reasonably read to mean "*the owner of an automobile not owned by the insured claiming coverage under section III(d)*", i.e., Claire June. The Court agrees that section III(e)(2) could be reasonably construed in this manner. In fact, unlike Defendants' proffered interpretation, this interpretation does not conflict with the "except as respects the named insured" phraseology discussed above. Quite simply, the phrase "owner of a non-owned automobile", without being defined, is not capable of a common meaning given the surrounding context. *See Pennsylvania National Mutual Cas. Co. v. Travelers Ins. Co.*, 592 A.2d 51 (Pa. App. 1991).

Defendants' cited authority adverse to Plaintiff's position is unimpressive. First, Defendants rely upon a statement made by Justice Levin in *State Farm Mutual Auto. Ins. Co. v. Ruuska*, 314 N.W.2d 184 (Mich. 1982). In *Ruuska*, Justice Levin opined in his concurring opinion that "[t]he term 'non-owned automobile' has an obvious and clear meaning...it means simply a vehicle is not owned by the insured" (emphasis added). *Ruuska*, however, does not sufficiently yield itself to Defendants' side. In *Ruuska*, the term "non-owned automobile" was actually defined by the insurance policy, so the Michigan Supreme Court's interpretation of "non-owned automobile" was not even the determinative issue.[2] More importantly, Justice Levin expressed that "non-owned automobile" means an "automobile not owned by the *insured*", as opposed to a vehicle "not owned by the ***named***

---

[2] Instead, the Michigan Supreme Court held that State Farm's "non-owned automobile" exclusionary clause was unenforceable because it was repugnant to Michigan's No-Fault Act. Therefore, the majority opinion declined to address whether the clause was ambiguous. *Ruuska*, 314 N.W.2d at 189.

insured" as championed by Defendants. This is significant for the reason that if indeed Claire June is an "insured" under section III(d), then according to Justice Levin's definition, section III(e)(2) could be properly defined as an "automobile not owned by the *insured*, i.e. Claire June.

Defendants also more generically argue that any other interpretation of "owner of a non-owned auto" besides the one presented by them is untenable. As already addressed, this is not the case. Furthermore, Defendants submit that their interpretation reconciles and harmonizes with section III(d). Defendants postulate that because section III(d) explicitly specifies that "non-owned" automobile refers to an automobile not owned by the NFO, then the "non-owned automobile" language found in section III(e)(2) must provide analogous meaning. According to steadfast legal principles, the Court should strive to harmonize varying insurance policy clauses within reason. Notwithstanding, the Court does not deem that the terminology "non-owned automobile" in section III(e)(2) must necessarily constitute an automobile not owned by the NFO for the sole reason that section III(d) does so. This is because if construed in such a manner, then section III(e)(2) considered on the whole becomes ambiguous, as discussed prior. Additionally, in light of section III(d), wherein Defendant Great American specified that a "non-owned automobile" meant an auto not owned by the NFO, it is apparent that Great American "could have easily inserted clearer language" in section III(e)(2). *See Norgan*, 469 N.W.2d at 26.

Because section III(e)(2), an exclusionary clause, is ambiguous, it must be strictly construed in favor of the insured, Claire June. To reiterate, exclusionary clauses in Michigan are strictly construed in favor of the insured and against the insurer. *See McKusick*, 632 N.W.2d at 528. "[I]t

is the insurer's responsibility to clearly express limits on coverage." Norgan, 469 N.W.2d at 26. As shown previously, section III(e)(2) is clearly ambiguous and must therefore be construed against Defendants.[3] Therefore, Claire

---

[3] Defendants contend that any ambiguities found in section III(e)(2) cannot be construed against them on the basis that Claire June is a non-party to the Great American policy issued to the NFO: *See Travelers Indemnity Co. v. Unites States*, 543 F.2d 71, 74 (90th Cir. 1976) ("Another maxim of interpretation applicable here is that a third party who is not a party to the contract is not usually entitled to strict construction in his favor in determining whether the contract was made for his benefit."); *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32, 37 (Tex. Civ. App. 1974) ("a third person who is not a party to a contract of insurance usually is not entitled to a strict construction in his favor in determining whether the contract was made for his benefit."), *but cf Toops v. Gulf Coast Marine, Inc.*, 72 F.3d 483,486 (5th Cir. 1996).

Defendants' contention is devoid of merit. Under Michigan law, the rules of construction apply irrespective of whether the person seeking coverage is a "party" to the insurance contract. *See, e.g. Engle,* 583 N.W.2d at 485-86 (affirmatively answering the question of whether the plaintiff satisfied the definition of a "person insured" under a policy issued to another, and rejecting insurer's "strained interpretation" of provision, based on rule that "exclusionary clauses in insurance contracts are to be strictly construed against the insurer.); *Zurich-American Ins. Co. v. Amerisure Ins. Co.*, 547 N.W.2d 52, 55 (Mich. App. 1996) (same); *Federal Mut. Ins. Co. v. Casey*, 167 N.W.2d 905,905-906 (Mich. App. 1969) (applying rule that ambiguity in an insurance policy is construed against the insured who wrote it, and holding that the driver was entitled to recover as a "permissive user" under the omnibus clause of the policy).

Also, the rule provided in *Klapp* that ambiguous contractual language is to be construed against the insurer only after extrinsic evidence is considered does not seemingly disrupt the general rule

June is not barred from coverage under section III(d) pursuant to section III(e)(2).

II. Whether Claire June was insured under section III(d) of the Great American policy.

Because the Court found that section III(e)(2) does not exclude Claire June from coverage, the Court must now examine whether section III(d) provided Claire June coverage. Plaintiff submits that Claire June was clearly an insured under said provision. Obviously, Defendants refute Plaintiff's position.

To reiterate, section III(d) reads as follows:

> (d) With respect to automobiles, any person while using any automobile owned or hired by or on behalf of the named insured including any person or organization legally responsible for such use, provided the use is within the scope of permission granted by the named insured ***and any officer, director, stockholder or partner of the named insured while***

---

that exclusionary clauses are to be strictly construed in favor of the insured. *Klapp* did not involve insurance contract exclusionary clauses. Therefore, the Court does not feel that extrinsic evidence as it concerns section III(e)(2) need be considered.

Even if Klapp were applicable to exclusionary clauses specifically, Defendants proffer no pertinent extrinsic evidence addressing the meaning of section III(e)(2). The affidavits of John Jensen and Benjamin Yale speak to the intent of section III(d), but not to section III(e)(2) in particular. This being so, it is proper to construe section III(e)(2) against Defendants. *See Klapp*, 663 N.W.2d at 457-58; *Wilkie*, 664 N.W.2d at 787.

using an automobile not owned by the named insured while such automobile is being used in the business of the named insured.

As provided earlier, section III(d) may be divided into four components: (1) whether Claire June was entitled to coverage based on being "any stockholder" of the NFO; (2) whether Claire June's truck was "not owned by" the NFO; (3) whether the accident occurred "while" Claire June was "using" his truck; and (4) whether the truck was "being used in the business of" the NFO at the time the accident occurred. The Court previously noted that Michigan's general rules of contract interpretation/construction are applicable to the present case.

The Court finds that Claire June was not provided coverage pursuant to section III(d) of the Great American policy as a matter of law based on two of the requirements not being met. First, the Court concludes that although Claire June was a "stockholder" of the NFO, liability was not sought against him as a "stockholder", and therefore Defendant Great American was not required to indemnify Claire June as "any stockholder" of the NFO. Secondly, the Court deduces that Junes' Trucking, Inc. was "using" the automobile involved in the accident, as opposed to Claire June personally. Said findings are discussed below.

A. **Whether Claire June was entitled to coverage based on being "any stockholder" of the NFO.**

Section III(d) grants coverage to "any...stockholder..." of the NFO. While conceding that Claire June was a stockholder of the NFO at the time of the accident, Defendants argue that Claire June's liability did not arise out of his "stockholder" status. Defendants expound that "Plaintiff seeks to gain

coverage for Claire June in a capacity other than the one in which he was sued." *(See* Def. G.A. Brief, p. 17.) Conversely, Plaintiff contends that section III(d) does not contain any such "scope of duties" requirement. Plaintiff points out that section III(d) merely says "any...stockholder...", which connotes a broad scope without limitation.

The Court concurs with Defendants' position that "[i]t is the claims made against the putative insured that determines whether or not that person comes within the definition of 'insured' and obtains coverage." *(See* Def. Brief, p. 15.) *See North River Ins. Co. v. Endicott*, 391 N.W.2d 454, 457 (Mich. App. 1986) ("plaintiff was not obligated to indemnify or defend Endicott because the allegations in the underlying lawsuit involved a claim arising from defendant's activities as a trustee, they did not involve defendant's performance of 'professional accounting services' as defined in the policy ...."); *Continental Ins. Co. v. Bones*, 596 N.W.2d 552, 561 (Iowa 1999) ("We start with the observation that coverage is controlled by the actual claim asserted against the insured, not the label the claimant chooses to put in his or her claim."). This is problematic for Plaintiff, as there was no underlying claim challenging Claire June's liability as "any stockholder" of the NFO. Rather, the unamended complaint filed in 1985 in the Wayne County Court (Def. Ex. A), upon which Claire June was found liable, alleges that Claire June owned the truck involved in the accident. (*Id.*, ¶ 10.) In addition, the underlying petition alleges that Claire June personally conducted the business of June's Trucking, Inc, including repair and maintenance of the trucks owned and operated by June's Trucking, Inc., and that the repairs were negligently performed. (*Id.*, ¶¶ 29, 31.)

Plaintiff contests Defendants' argument on the basis that nowhere in section III(d) does it state that "any stockholder" claiming coverage must have been acting within their scope as an NFO stockholder in order to enjoy coverage. Plaintiff draws attention to those cases cited by Defendants and clarifies that each of those cases involved specific language requiring that the insureds act "within the scope of their duties" as stockholders, etcetera, in order to be provided coverage. *See, e.g., Hack v. Standard Accident Ins. Co.*, 88 N.W.2d 424, 425 (Mich. 1958) ("...any...stockholder...while acting within the scope of his duties as such"); *Bowie v. Home Ins. Co.*, 923 F.2d 705, 707 (9th Cir. 1991) ("any... stockholder...while acting within the scope of their duties as such"); *North River*, 391 N.W.2d at 456 (accountant's policy covered liability "caused by acts, errors, or omissions in the insured's performance of professional accounting services for others"). Phrased aphoristically, Plaintiff espouses that Claire June was an NFO stockholder and is included under Section III(d), irrespective of whether he was sued in his capacity as an NFO stockholder.

The Court concludes that because there is no reference to Claire June as "any stockholder" of the NFO in the underlying claim, then Defendant Great American has no obligation to indemnify Claire June. While section III(d) does not possess "scope of duties" language, it does conspicuously depict that coverage is extended to "any...stockholders". Quite simply, Claire June was not sued as an NFO stockholder, and therefore does not come within the coverage provided under section III(d). Instead, liability was sought against Claire June as the sole shareholder of June's Trucking, Inc., owner of the truck involved in the accident, and as the performer of faulty maintenance. Said contentions do not fall under the coverage provided by section III(d) to "any stockholder" of the NFO. Claire June was an NFO

stockholder, but there are no claims raised against Claire June as an NFO "stockholder" in the underlying petition. As subtly phrased by Defendants, "[t]o permit Plaintiff to invoke III(d) is to permit Plaintiff to go beyond the claims that were made against Mr. June upon which his liability was bottomed and which claims determined whether or not coverage was afforded to Mr. June." (Def. Brief, p. 18.)

B. Whether the accident occurred "while" Claire June was "using" his truck.

Section III(d) provides coverage to "any stockholder...using an automobile...while such automobile is being used...." Defendants opine that Claire June was not "using" his truck; instead, the truck was being "used" by June's Trucking, Inc. Defendants also more basically contend Claire June was not "using" the truck at the time of the accident because he was not exercising any dominion or control over the truck. In juxtaposition, Plaintiff elicits the following four bases: (1) Claire June was "using" the truck when the accident occurred because he was "operating" the truck; (2) Claire June was "using" the truck because he put the truck into service and the accident occurred while that service was being performed; (3) Claire June was "using" the truck because a corporate manager/principal who directs an employee to use an automobile is "using" the automobile; and (4) Claire June was "using" the truck since a vehicle is "used" by both its owner and those driving it with the owner's permission.

The Court finds that Claire June could not have been "using" the automobile in his personal capacity, as it was being "used" in furtherance of Junes Trucking, Inc. "As a general proposition, the law treats a corporation as an entirely separate entity from its stockholders, *even where one person*

owns all the corporation's stock" (emphasis added). *Foodland Distributors v. Al-Naimi*, 559 N.W.2d 379, 381 (Mich. App. 1997) (citing *Kline v. Kline*, 305 N.W.2d 297 (Mich. 1981)). Claire June owned the truck giving rise to the accident causing the pending litigation; however, the truck was "used" in furtherance of his corporation, June's Trucking, Inc. as opposed to being "used" by Claire June in his personal capacity. *(See* Def. Ex. K.) The truck was hauling NFO milk, which constituted part of the business of June's Trucking, Inc. Accordingly, the invoices were from June's Trucking, Inc., and the checks were made payable to June's Trucking, Inc. *(See* Def. Exs. L; M.) These facts indicate that the truck was "used" by the corporate entity and not by Claire June personally. In fact, the underlying suit alleged it was June's Trucking, Inc. that was liable in allowing a negligent employee to operate the truck in the course of its business. *(See* Def. Ex. A, ¶¶ 18-24.) The only claim against Claire June in his individual capacity involved maintenance and repair he performed on the truck, but it was never asserted that Claire June was personally "using" the truck. (*Id.*, ¶¶ 25-31.)

The Court finds no evidence that June's Trucking was a "mere instrumentality" of Claire June's or that Claire June abused the corporate form to facilitate engaging in fraudulent or wrongful conduct. *See Soloman v. Western Hills Development Co.*, 312 N.W.2d 428, 431 (Mich. 1981) (discussing "piercing the corporate veil"). Therefore, there are absent any justifications to disregard the "use" of the truck by the corporate entity. The Court thus does not deem that Claire June was personally "using" the automobile involved in the accident.

The authority cited by Plaintiff does not disavow the above conclusion. Plaintiff proffers numerous cases

propounding that Claire June was "using" the truck on grounds that he "put the truck into service". However, these cases to not involve the utilization of automobiles by corporate entities. *See Bowman v. Preferred Risk Mut. Ins. Co.*, 83 N.W.2d 434, 437 (Mich. 1957); *Michigan Mutual Ins. Co. v. Dowell*, 514 N.W.2d 185 (Mich. App. 1994); *Samuels v. American Auto Ins. Co.*, 150 F.2d 221 (10th Cir. 1945); *Budget Rent-A-Car Systems, Inc. v. State Farm Mutual Ins. Co.*, 727 So.2d 287 (Fla. App. 1999); *Rogers v. MFA Mutual Ins. Co.*, 554 S.W.2d 327 (Ark. 1977). Moreover, the Court does not deem *Atlantic Mutual Ins. Co. v. Palisades Safety & Ins. Assoc.*, 837 A.2d 1096 (N.J. Super. Ct. App. Div. 2003) analogous to the present case. Plaintiff cited *Atlantic Mutual Ins. Co.* to establish that a corporate manager is "using" an automobile when allowing and instructing an employee to utilize said automobile. *Atlantic Mutual Ins. Co.*, however, is dissimilar to the present scenario, in that the fighting issue in establishing coverage was not whether it was the *corporate entity* ***or the manager/supervisor*** that was "using" the automobile. In fact, the entire purpose of the insurance policy at issue in *Atlantic Mutual Ins. Co.* was to provide coverage to *anyone,* managers and employees included, found to be *"using" the automobile* ***with the permission of the corporate entity***. *Id.* at 1099. Due to the disparate circumstances, this precedence is unpersuasive.

Accordingly, Claire June was not covered under section III(d) because (1) although an NFO "stockholder", he was not sued as "any stockholder" of the NFO, and (2) he was not "using" the truck in his individual capacity. Rather, the truck was being "used" by Junes' Trucking, Inc.

ORDER

IT IS THEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Summary Judgment is hereby **DENIED**, and Defendants' Motion for Summary Judgment is hereby **GRANTED**.

Any costs associated with this action are therefore taxed to Plaintiff.

IT IS SO ODERED this 8 day of June, 2004.

/s/
JOEL D. NOVAK, JUDGE
Fifth Judicial District of Iowa

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Case No. 85-527157-NI

[Filed October 1, 2000]

HULDA N. SHURTLEFF, Personal Representative of the Estate of ROBERT C. SHURTLEFF, Deceased, Plaintiff,	)
v.	)
GREAT AMERICAN INSURANCE COMPANY, Garnishee/Defendant.	)

ORDER OF DISMISSAL

At a session of said Court, held in the City-County Building, Detroit, Michigan, on Oct 1, 2000

PRESENT: THE HONORABLE Paul S. Teranes
Circuit Court Judge

This matter having regularly come before the Court for trial, and the Court having precluded certain claims under the pleadings, and the Court having granted directed verdicts as to certain of the claims, and the jury having returned a verdict in favor of garnishee/defendant as to other claims, and the claim for equitable estoppel having been severed;

IT IS HEREBY ORDERED that all claims of plaintiff, Hulda N. Shurtleff, Personal Representative of the Estate of Robert C. Shurtleff, deceased, as against garnishee/defendant, which were alleged in the above-captioned cause, except as to those referred to in the next paragraph hereof, are dismissed with prejudice and without costs.

IT IS FURTHER ORDERED that pursuant to the Stipulation of the parties, the claim of equitable estoppel (defendant should be estopped from denying coverage) and the claim that the primary defendant, Claire June, was entitled to coverage under Great American Insurance Company excess/umbrella policy (no. PRO6-27-84-59-01 issued to the NFO) under the theory of "stockholder/member" may be and are hereby dismissed, pursuant to the Stipulation of the parties, and said dismissal is voluntary, without prejudice and without costs, pursuant to MCR 2.504(a).

IT IS FURTHER ORDERED that pursuant to the parties' stipulation, plaintiff waives any right of post-judgment proceedings and/or appeal with regard to those claims dismissed with prejudice.

IT IS FURTHER ORDERED that nothing herein shall be deemed to impair plaintiff's Judgment against the primary defendants, which Judgment shall remain in full force and effect except with reference to any partial satisfactions and/or setoffs as a result of settlements with any other parties or

garnishee/defendants or any credits which garnishee/defendant Great American is entitled to, if any, by reason of plaintiff's settling with primary carriers for less than their full obligation.

/s/ Paul S. Teranes
Circuit Court Judge

I HEREBY STIPULATE TO ENTRY
OF THE ABOVE ORDER:

/s/
RICHARD M. GOODMAN (P14169)
Attorney for Plaintiff

/s/
LEONARD B. SCHWARTZ(P20132)
Attorney for Garnishee/Defendant

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

[Filed December 21, 1999]

VERDICT FORM

We, the Jury, make the following answers to the questions submitted by the Court:

Question No. 1: Was the truck or trailer a hired auto as used in the insurance policies in question under the facts and the law applicable in this case?

Answer: No ✓

Question No. 2: Was the truck and trailer an owned auto as used in the insurance policies in question under the facts and the law applicable in this case?

Answer: No ✓

Date: Dec. 21, 1999
Foreperson Signature: /s/ Shelly McKenzie Wilson

(2)

FILED
JAN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-861

In the Supreme Court of the United States

HULDA SHURTLEFF, Personal Representative of the Estate of ROBERT SHURTLEFF, Deceased, and Assignee of the Estate of CLAIRE G. JUNE, Deceased,
Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANY, a Foreign Corporation, and OHIO CASUALTY INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Iowa

BRIEF IN OPPOSITION

TeLisa T. Owens
Counsel of Record
Leonard B. Schwartz
SOMMERS SCHWARTZ, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The issue decided by the Iowa Court of Appeals was how the term "non-owned automobile" was to be interpreted in the context of Respondent's policy of insurance. The court did not make a finding of fact as to whether the vehicle was a hired vehicle but merely concluded that since the vehicle was owned by Claire June (Petitioner's claimed omnibus insured) and was a "non-owned automobile" as that term was interpreted by the Iowa court (not owned by the National Farmers Organization (NFO), the named insured), Claire June, as the owner of said "non-owned" vehicle, was precluded from coverage. While not necessary to its opinion, the court did make a statement to the effect that whether the vehicle was considered "hired" or "non-owned", Claire June, as the owner of the vehicle, was not covered under Respondent's policy. Petitioner concedes that the vehicle was owned by Claire June. It would then follow, according to the interpretation assigned by the court to the term "non-owned vehicle", Claire June as the owner of the vehicle was not covered under the policy. The issues presented are:

1. **DOES THE SUPREME COURT HAVE JURISDICTION; WAS THE IOWA COURT'S OPINION FOUNDED ON A FAILURE TO GIVE FULL FAITH AND CREDIT TO A MICHIGAN JURY VERDICT AND WAS the ISSUE PROPERLY PRESENTED TO THE IOWA COURT?**

2. **ASSUMING, WITHOUT CONCEDING, THAT THIS HONORABLE COURT HAS JURISDICTION, DOES THE PETITION SEEKING REVIEW OF AN UNPUBLISHED**

INTERMEDIATE STATE COURT OF APPEALS OPINION PRESENT SPECIAL AND IMPORTANT REASONS NECESSARY TO MOVE THE COURT'S DISCRETION?

3. IF THIS COURT WERE TO GRANT CERTIORARI AND ULTIMATELY REMAND THE CASE TO THE IOWA COURT DIRECTING THE IOWA COURT TO ADDRESS THE FULL FAITH AND CREDIT ISSUE, WOULD A DIFFERENT RESULT BE OBTAINED?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent, Great American Insurance Company's parent company is American Financial Corporation which holds 100% of the stock of Great American Insurance Company. Ohio Casualty Company is an Ohio corporation whose shares are publicly traded and it is not a subsidiary of any other corporation. The only relationship between the two respondents is that a portion of Great American's business, which may or may not include the policy in question, was ceded to Ohio Casualty Insurance Company.

TABLE OF CONTENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS AND ORDER BELOW 1

SUPREME COURT LACKS JURISDICTION 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR DENYING PETITION 10

CONCLUSIONS 14

TABLE OF AUTHORITIES

Cases

Adams v. Robertson,
520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed. 2d 203 . 3, 12

Black v. Cutter Laboratories,
351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 12

Howell v. Mississippi,
543 U.S. 440, 160 L.Ed.2d 873, 125 S.Ct. 856 . . . 14

McGoldrick v. Compangnie Generale Transatlantique,
309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 3

Statutes

28 USC § 1257 . . . . . *passim*

28 USC § 1738 . . . . . 3, 12, 13

Rules

Supreme Court Rule 10 . . . . . 10, 11

OPINIONS AND ORDER BELOW

Petitioner seeks relief with reference to the Opinion of Iowa Court of Appeals, Shurtleff v. Great American Insurance Co. et al (No. 6-290/04-1093, released 6/28/06) (Cert. Petition App. B). Further, so that the Court of Appeals Opinion may be read in context with the trial court opinion which was under review by the Iowa Court of Appeals, the ruling of the trial court on cross motions for summary disposition is attached (Cert. Petition App. C). The Order of the Supreme Court denying further review is attached (Cert. Petition App. A).

SUPREME COURT LACKS JURISDICTION

The decision of the Iowa court did not turn on nor does it present a federal question as framed by the language of 28 USC § 1257. The issue decided by the Iowa court was the interpretation of the term "non-owned automobile" as employed in Respondent's contract of insurance. The Iowa court determined that the term "non-owned automobile" meant a vehicle not owned by the named insured (the NFO). The court went on to conclude that whether the vehicle was "hired" or, as the court construed the term, it was "non-owned", Mr. June was not an insured because as the owner of the subject matter automobile, he came within the exception to the extension of coverage. Ergo, since the subject matter vehicle was not owned by the NFO (hence a "non-owned automobile" as defined by the Iowa court) and Mr. June in fact owned the vehicle, no coverage was afforded to Mr. June under the terms of the policy. The court ventured that it would not matter whether the vehicle was "hired" or "non-owned", Mr. June was not afforded coverage.

Petitioner concedes that Claire June was the owner of the subject matter vehicle. Hence, the issue before the court with reference to III.(e) of Respondent's policy of insurance (the provision upon which the Iowa Court of Appeals ruled) was the meaning of the term "non-owned automobile". Once the court determined that the trial court was in error in finding the term ambiguous and in fact applied a definition to the term, then as the court ventured, it did not matter whether the vehicle was a "hired" vehicle (we submit it was not) or whether it was a "non-owned automobile" as the court now defined that term (it was), Mr. June, as the owner, was not entitled to coverage.

The Iowa Court of Appeals was not presented with a full faith and credit issue as no constitutional issue was "specially set up or claimed" nor was the Iowa court given an opportunity to pass upon the same. Hence, Petitioner has not brought this matter within the Court's jurisdiction as provided by 28 USC § 1257. The full faith and credit issue was not necessary to the opinion but had the issue been required to be presented to the Iowa court, the Iowa court in giving full faith and credit to the verdict form would not only give full faith and credit to the finding that the vehicle was not "hired" by the NFO but would also have to give full faith and credit to that portion of the Michigan verdict stating that the NFO did not own the subject matter vehicle. It would then follow that the vehicle would be a "non-owned automobile" as per the court's definition and hence Mr. June as the owner of the same would be precluded from coverage consistent with the Iowa Court of Appeals findings.

Petitioner does not present a federal question or claim nor was Petitioner's alleged federal claim "addressed by, or properly presented to, the state court that rendered the decision" and hence the Petition does not come within 28

USC § 1257 and the requirements of this Honorable Court as set forth in *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed. 2d 203 (1997); *McGoldrick v. Compangnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 84 L.Ed. 849 (1940).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent disagrees with Petitioner's assertion that the constitutional provision relied upon by Petitioner is in fact involved nor, for the reasons set forth above, does Respondent believe that Petitioner has brought this Petition within the provisions of 28 USC § 1257. Petitioner's reference to 28 USC § 1738 is likewise inapplicable as there has been no showing of the attestation and/or authentication as required by the statute. In short, this case simply involves an issue of contract interpretation.

STATEMENT OF THE CASE

Respondent agrees that Claire June was the principal stockholder of June's Trucking (his wife also held stock). We also agree that Claire June owned the subject matter truck which was used in the business of June's Trucking to carry out its contract with the local NFO member farmers to deliver their milk to a dairy. Claire June, in addition to his role as an independent hauler, was also a member of the NFO not because he was a hauler but because he had an operating farm. He, along with thousands of other members are by statute considered shareholders and although they were not contemplated to be considered shareholders under the policy, Respondent does concede that Claire June, by virtue of his membership in the NFO, was in fact a stockholder.

Respondent's named insured in the policy at issue was the NFO, an agricultural cooperative with members throughout the United States which collectively bargains in behalf of its members to obtain an appropriate price for their farm products. The farmers themselves and/or the NFO arrange to have the product delivered in large part by employing independent contractor haulers. Some of these haulers may in some cases be members of the NFO but these are two separate roles because members are not required to haul and haulers cannot become members merely by their status as haulers.

As indicated, Claire June qualified to be a member of the NFO as the owner and operator of a working farm. Unconnected with his membership, he also was the principle owner of the stock in June's Trucking and in effect operated June's Trucking which, in fact, hauled the product of NFO member farmers. The truck involved in the accident was owned by Claire June but was used exclusively in the business of June's Trucking. June's Trucking was insured by Michigan Mutual Insurance Company and Claire June, as the owner of a vehicle scheduled on the Michigan Mutual policy, was insured by Michigan Mutual and in fact was defended in the Michigan action by Michigan Mutual and indeed, Michigan Mutual paid its policy limits plus interest upon conclusion of the Michigan actions.

A. THE ACCIDENT GIVING RISE TO THE INITIAL MICHIGAN TORT CLAIM AND THE INITIAL MICHIGAN TORT LITIGATION AND THE PARTIES THERETO.

Petitioner is and her decedent was a Michigan resident and the subject matter accident occurred in Michigan. Within a few months after the accident, Petitioner brought suit in

Michigan alleging that Claire June was the owner of the vehicle and responsible for maintenance and improperly maintained the vehicle. Suit was also brought against Richard June, the operator of the vehicle and an employee of June's Trucking. The claim against June's Trucking was basically for the vicarious liability for its employee, Richard June. All of the Junes were Michigan residents and the vehicle was insured under June's Trucking's Michigan Mutual policy as a designated vehicle and Claire June was an additional insured under said policy. Michigan Mutual defended all of the June defendants and paid their policy limits ultimately.

In addition to the above-referenced June defendants, the NFO was named as a defendant, alleging certain claimed independent acts of negligence as well as a theory of respondeat superior. The case went to trial and a judgment was obtained against the Junes only, the jury concluding that the NFO committed no independent acts of negligence nor was it liable as the Junes were in fact independent contractors and not agents or employees of the NFO.

On appeal, the Michigan Court of Appeals affirmed as to the NFO but reversed because of an instructional error as to damages and remanded the case for a new trial on damages only as to the June defendants. Throughout, the Junes were defended by Michigan Mutual under its truckers' policy and, in fact, Michigan Mutual paid its policy limits plus interest.

On retrial, Petitioner obtained a more favorable judgment against Claire June and the other June defendants.

B. THE MICHIGAN GARNISHMENT ACTION

Upon having obtained the second judgment against Claire June, Petitioner garnisheed the various NFO carriers

including Respondent, claiming that Claire June was an additional insured under the NFO policies of insurance. Respondent's policy language relied upon by Petitioner in salient part provided:

> "III. **Definition of Named Insured and Insured:** The unqualified word 'insured' includes the named insured and also: . . .
>
> (d) With respect to automobiles, any person while using any automobile owned by or hired for use by or on behalf of the named insured . . . provided the use is within the scope of permission granted by the named insured **and any officer, director, stockholder or partner, of the named insured while using any automobile not owned by the named insured while such automobile is being used in the business of the named insured**". (Emphasis supplied)

III.(d) quoted above was qualified by III.(e) which again in salient part provided:

> (e) Except as respects the named insured, none of the following shall be an insured under paragraph (d)
>
> . . . .
>
> (2) The **owner** or **lessor** of a **hired or non-owned automobile**, . . .

Petitioner had a plethora of theories in the Michigan garnishment action, claiming that the vehicle was "owned" or

"hired" by the NFO and Petitioner also made the same claim as subsequently brought before the Iowa court, i.e., that Mr. June, as a member of the NFO, had shareholder status and that he was operating the vehicle in the course of his duties with the NFO and hence was an insured under the policy. The garnishment action went to trial on all of the issues except for an issue of estoppel which was to be tried at the conclusion of the trial as to all other issues if it were still necessary. At the conclusion of proofs, the Michigan judge directed a verdict in favor of these Respondents on the stockholder/member issue presented to the Iowa court, holding that III.(d) did not apply and in any event any such coverage would be excluded by III.(e) because Claire June was the owner of the vehicle. See Iowa trial Court's ruling (Cert. Petition App. C at p. 15A).

The only issues that went to the jury was whether or not, under the instructions given by the court, the vehicle was "hired" or "owned" by the NFO and a jury determined that the NFO neither owned nor hired the vehicle. Instead of seeking to proceed with the second trial on the estoppel issue which had been expressly preserved, Plaintiff agreed to dismiss the entire case; all claims were dismissed with prejudice with the exception of the reserved estoppel issue and the withdrawn issue of "stockholder/member" which two claims were dismissed without prejudice. While the estoppel issue had been preserved for a trial to follow the initial garnishment trial, the same could not be said of the "stockholder/member" issue. It had been Respondent's position that a judgment is res judicata, under Michigan law, as to all issues which were raised or which could have been raised, the mere fact that Petitioner withdrew an issue which in fact had been raised and ruled upon required the application of the doctrine of res judicata should a second lawsuit be commenced on that issue. A dismissal without

prejudice, according to Respondent's position, was as if the case had never been commenced and the issue had never been raised. However, the Iowa Court of Appeals did not rule on that issue.

C. THE IOWA PROCEEDINGS BELOW

Not having succeeded in Michigan, Petitioner brought an action in Iowa and survived Respondent's forum non conveniens motion. The Iowa trial court judge subsequently ruled that Michigan law applied to the interpretation of the policy and the effect of the Michigan judgment. Thereafter, cross-motions for summary disposition were filed and the trial judge denied Petitioner's motion for summary disposition and granted Respondent's motion and found that plaintiff had not brought Claire June within the general description of an insured in III.(d).

The trial court further volunteered that III.(e), the exception to III.(d), was inapplicable because the term "non-owned automobile" was found to be ambiguous. However, a discussion of III.(e) was unnecessary because if III.(d) did not extend coverage to Claire June (as the trial court found), there was no need to go to III.(e) which acts as an exception to III.(d); there is no need to make an exception for that which is not included.

Petitioner appealed the trial court's ruling as to III.(d), claiming that Claire June came within the wording of III.(d). Respondent cross appealed seeking to overturn the trial court's holding that the term "non-owned automobile" was ambiguous. Respondent argued that when the term "non-owned automobile" as employed in III.(e) was viewed in context with the extension of coverage under III.(d), the reference to a "non-owned automobile" in III.(e) had to be a

reference to an automobile "not owned by the named insured" referred to in III.(d). It would then follow that since Mr. June owned the subject matter vehicle which met the definition of a "non-owned automobile", Mr. June would be excepted from any coverage which might have been extended under III.(d).

The Iowa Supreme Court remanded the case to the Iowa Court of Appeals and the Iowa Court of Appeals affirmed the district court. However, in so doing, it rested its opinion on the fact that when (d) and (e) were read together, the term "non-owned automobile" was not ambiguous. The term applied to preclude coverage to an owner (Claire June) of a vehicle "not owned by the NFO"; the "owner . . . of a . . . non-owned automobile" as referred to in III.(e)(2) which acted as an exception to the grant of coverage found in III.(d). Hence, the "non-owned automobile" in III.(e) was in fact the automobile "not owned by the named insured" referred to in III.(d). The very Michigan finding which Petitioner relies upon now reflecting a jury's determination that the subject matter vehicle was not "hired" by the NFO reflected further that the vehicle was not "owned" by the NFO. Hence, to the extent that Mr. June might have been extended coverage under III.(d) in operating a vehicle which was not owned by the NFO in the course of the NFO's business (which would have been contrary to the trial court's ruling and was not addressed by the Court of Appeals), he would be excluded from coverage under III.(e) as the owner of the "non-owned" vehicle; the vehicle not owned by the named insured (NFO) as the language was interpreted by the Iowa Court of Appeals. The trial court had indicated in its opinion that Claire June was the owner of the vehicle and that issue was conceded by Petitioner at the trial level and has now again been conceded in her Petition at page 3 thereof.

Contrary to Petitioner's concluding paragraph in her Statement of the Case, the Michigan garnishment action not only found that the truck was not hired by the NFO but also that it was not owned by the NFO (hence a non-owned automobile per the Iowa Court of Appeals). The Iowa Court of Appeals opinion found that the truck as per III.(e) of the policy was a "non-owned automobile" and that that term was not ambiguous. The Iowa court then went on to state that it did not matter whether the vehicle was "hired" or "not owned by the NFO", no coverage was afforded to Mr. June because he was the owner of the vehicle. After all, if the vehicle was neither hired by the NFO nor "not owned by the NFO", no coverage could be extended under III.(d) to begin with but if it was "hired" or "non-owned by the NFO", provided that other threshold requirements were met, then one could be an additional insured as long as he or she was not the owner of the vehicle. So, for example, if a member/stockholder had to go to another city to act in behalf of the NFO and had to rent a vehicle in order to conduct that business, he would have coverage. However, if the owner of that rented vehicle fortuitously happened to be a member of the NFO and was hired to drive the visiting member, he would not have coverage.

REASONS FOR DENYING PETITION

A. NO FEDERAL QUESTION WAS PRESENTED BELOW TO INVOKE THIS COURT'S JURISDICTION

The grant of certiorari under Title 28, § 1257 is discretionary; the statute provides the jurisdictional framework within which the court **may** choose to review cases. The court's discretion is confirmed in Supreme Court Rule 10, which provides "**review on a writ of certiorari is**

not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." (Emphasis supplied). Rule 10 then provides for certain considerations that the court might employ, including (b) (the decision with reference to an important federal question by a state court that conflicts with either another state court or a decision of the United States Court of Appeals) and (c) (a decision of a state court on an important question of federal law that has not been, but should be, settled by the Supreme Court or which is in conflict with a decision of the Supreme Court).

Here, the Iowa court was not presented with a full faith and credit issue nor was its opinion premised on a finding inconsistent with the Michigan verdict. Mr. June owned the vehicle as conceded by Petitioner and as found by the Iowa trial court and Mr. June's ownership was not placed in issue on appeal by Petitioner. The Iowa court, in reading paragraphs III.(d) and III.(e) together and in context as required, determined that the "non-owned automobile" referred to in III.(e) (excluding coverage to owners of a "non-owned automobile") was the vehicle which was "not owned by the named insured" referred to in the extension of coverage in III.(d). It was not necessary to the opinion to find that the vehicle was "hired" nor was it a specific finding by the Iowa Court of Appeals; the Iowa Court of Appeals merely opined that it did not matter whether the vehicle was "hired" or "not owned by" the NFO because in either event Mr. June, as the owner, was not entitled to coverage. Certainly the very Michigan verdict upon which Petitioner relies for a determination that the vehicle was not "hired" likewise reflects the jury's finding that the subject matter automobile was "not owned" by the NFO. It would purely be a matter of state law, then, to conclude, under the definition of "non-

owned automobile" as found the Iowa court, that Mr. June as the owner of the vehicle was not entitled to coverage.

Petitioner attempts to create a constitutional issue where none really exists and those attempts should avail Petitioner naught.

Had Petitioner wanted to present a full faith and credit issue to the Iowa court, Petitioner could have done so by following the mandate of 28 USC § 1738 and presenting an appropriately attested and/or authenticated document (which to date Petitioner has not done) and should have set up said issue or claimed such right as required under 28 USC § 1257(a). Had Petitioner done so, it would have given the Iowa court an opportunity to rule upon the same. The Iowa court, however, did rule and reached a result on grounds which do not invoke any constitutional rights or requirements. The Iowa Court of Appeals opinion rests on adequate state grounds and no federal question has been raised. *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 (1956); *Adams, supra.*

B. ASSUMING THE COURT HAS JURISDICTION, SHOULD THE COURT EXERCISE ITS DISCRETION IN FAVOR OF GRANTING THE PETITION.

Petitioner does not present a "compelling" case for review by this Court. Petitioner presents one episode where the Iowa court, not having been presented with a full faith and credit issue, decided a case basically on state law but which Petitioner would now twist into a constitutional question. We would concede that Petitioner's claim is of import to her; the case has been kept alive for better than 20 years and more than a million and a half dollars has already been paid out to

claimants, including Petitioner. Granted, Petitioner has not been fully compensated if the measure of compensation is the Michigan jury verdict and the Michigan tort action. However, while this case is of import to the parties, it involves the interpretation of a policy of insurance which is more than 22 years old, the language of which has gone through a number of changes and there is no real disagreement as to the requirements of Article IV and 28 USC §§ 1257 and 1738. However, the constitutional provision and the subject matter statute were not brought to the attention of the court, ruled upon by the Iowa court, nor would the result have changed if in fact the issue had been properly presented. The Iowa court's interpretation and conclusions were based upon purely state law, interpretation of contracts and facts not inconsistent with the prior Michigan ruling.

Moreover, the Petition does not present a substantial question of constitutional law that has not been previously reviewed by this Court nor does it present any conflicts between various jurisdictions. At best, it raises an isolated claim of a federal question which was not really passed upon by the Iowa court or necessary to the Iowa court's decision. The Court should therefore deny Petitioner's petition because the case does not qualify for or otherwise merit review in this Court.

C. IF THE COURT WERE TO GRANT CERTIORARI AND IF PETITIONER WERE TO OBTAIN ALL OF THE RELIEF WHICH IT WILL ULTIMATELY REQUEST FROM THIS COURT, THE RESULT UPON REMAND WOULD NOT BE CHANGED.

As indicated previously, the full faith and credit issue was not raised in the proceedings below notwithstanding the fact

that apparently the Michigan finding, according to Petitioner now, was of import. This Court should decline to address issues that were not raised below nor addressed by the state court. *Howell v. Mississippi*, 543 U.S. 440, 160 L.Ed.2d 873, 125 S.Ct. 856 (2005).

Additionally, even if this Court were to find that it had jurisdiction and granted the petition, the result in the state court would not change on remand. Mr. June, as the owner of a "non-owned" automobile (as that term was defined by the Iowa court and which definition does not present a federal question), would not be entitled to coverage. Petitioner concedes Mr. June's ownership and if the Iowa Court of Appeals definition of "non-owned automobile" is applied, Mr. June is not entitled to coverage. Under those circumstances, it is difficult to say that the Petition sets forth any compelling or important reasons for invoking this Court's jurisdiction.

CONCLUSIONS

Petitioner has managed to continuously litigate this case for over 20 years through creative lawyering and a willingness to stand on both sides of an issue, i.e., a claim that the vehicle was "hired" for purposes of the Michigan garnishment action and now taking great offense at a claimed "finding" by the Iowa court that the vehicle was "hired". In fact, no such determination was made by the Iowa court or necessary to the Iowa court's opinion. For the reasons stated, Respondent respectfully requests that this Court deny the petition and decline to remand the case for further review.

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.
TELISA T. OWENS (P63818)
Counsel of Record
LEONARD B. SCHWARTZ (P20132)
2000 Town Center, Suite 900
Southfield, MI 48075
248-355-0300

Attorneys for Respondent

Dated: January 22, 2007